very much larger sum of $5,000,000/- in another provision which, in my view, is really a general forfeiture provision in the agreement *in terrorem*. This provision is thus *per se* the kind of stipulation by way of penalty envisaged by section 75 of the Contracts Act, 1950 which reads:-

"75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

It is plain, therefore, that the defendants are only entitled to obtain reasonable compensation within the limitations of this section. In the result, the invitation to look at the letters and other documents that were exchanged between the plaintiff's solicitors and the defendants' solicitors in order to ascertain the nature of the payment of $1,000,000/- requires no further consideration. I would, accordingly, make an order in terms of prayers 1 and 2 of the application and direct that reasonable compensation by way of damages be assessed at a later date in accordance with prayer 4. The plaintiff will be entitled to the costs of this application.

Order accordingly.

Solicitors: *Shook Lin & Bok; Soo Thien Ming & Shahrizat.*

RONALD QUAY SDN. BHD. v. MAHESWARY SDN. BHD.

[A.C.J. (Zakaria Yatim J.) May 13, 1986]

[Kuala Lumpur – Civil Suit No. C 1380 of 1984]

Practice and Procedure – Summary judgment – Bona fide and plausible counterclaim for amount greater than plaintiff's claim – Stay of execution pending trial of counterclaim – R.H.C. 1980, O. 14.

In this case the plaintiff's claim was for a sum of $116,635.71 being the amount due and owing from the defendant to the plaintiff for services rendered by the plaintiff to the defendant. The defendant admitted that the plaintiff rendered the services but it denied that it was indebted to the plaintiff in the sum claimed. It also made a counterclaim in the sum of $250,000.00 as damages, alleging that the plaintiff in breach of its contractual obligations, cancelled the advertisement without the consent of the defendant and the defendant suffered loss of sales and accruable profits. The Senior Assistant Registrar gave judgment for the plaintiff for the sum claimed but ordered stay of execution pending the trial of the counterclaim. The plaintiff appealed.

Held: (1) there was a *bona fide* and plausible counterclaim the amount of which was more than the plaintiff's claim. The counterclaim was plausible as it was reasonably possible for the defendant to succeed if the counterclaim was brought to trial. The counterclaim was also not frivolous;

(2) the Senior Assistant Registrar was right when he ordered a stay of execution pending the trial of the counterclaim.

Cases referred to:

(1) *Societe des Etains de Bayas Tudjuh* v. *Woh Heng Mining Kongsi* [1978] 2 M.L.J. 267, 269.
(2) *Lee Guat Eng* v. *Seet Tiam Hock* [1974] 1 M.L.J. 178, 179.
(3) *Sheppards & Co.* v. *Wilkinson & Jarvis* (1889) 6 T.L.R. 13, C.A.

CIVIL SUIT.

C. Sri Kumar for the appellant.
Y. Sivaloganathan for the respondent.

Cur. Adv. Vult.

Zakaria Yatim J. : This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar delivered on October 11, 1984 ordering a stay of execution on the final judgment entered against the defendant pending the hearing and disposal of the defendant's counterclaim.

The plaintiff's claim was for a sum of $116,635.71 being the amount due and owing from the defendant to the plaintiff in respect of services rendered by the plaintiff to the defendant at the request of the defendant. The defendant in its statement of defence admitted that the plaintiff rendered the services but denied that it was indebted to the plaintiff in the sum claimed. The defendant also made a counterclaim alleging that the plaintiff, in breach of its contractual obligations, cancelled the advertisement without the consent of the defendant and the defendant suffered loss of sales and accruable profits. Accordingly, the defendant claimed $250,000.00 as damages in the counter-claim.

The plaintiff applied for summary judgment under Order 14, rule 1 of the Rules of the High Court, 1980 for the sum of $116,635.71. On October 11, 1984, the Senior Assistant Registrar, entered judgment in the said sum but allowed stay of execution pending the trial of the counterclaim.

The appeal was heard before me in Chambers on December 11, 1984 and after hearing the arguments of both counsel for the plaintiff and the defendant, I dismissed the appeal with costs. Mr. C.S. Kumar, counsel for the plaintiff applied for the matter to be adjourned into Open Court for further argument. I allowed the application and futher argument was heard by me in Open Court.

It was not disputed by the parties that in the present case stay of execution pending the trial of the defendant's counter-claim should be allowed provided that the counter-claim set out by the defendant was *bona fide* and plausible. The authorities are clear on this point. In *Societe des Etains de Bayas Tudjuh* v. *Woh Heng Mining Kongsi*[1], Abdoolcader J., as he then was, held that where there was clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to trouble and expense of proving it, but the defendant set up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should not be for leave to defend but should be for judgment on the claim with a stay of execution until the trial of the counterclaim. In his judgment at page 269, the learned Judge said:

"If a defendant, though he admits part of the plaintiff's claim, sets up a defence to the residue and a counterclaim for a larger amount than the part of the plaintiff's claim admitted, he is entitled to unconditional leave to defend as to the whole (*Court* v. *Sheen*, 7 T.L.R. 556). When a *bona fide* counterclaim is set up arising out of the subject-matter of the action and connected with the grounds of defence, unconditional leave to defend should be given, even where the defendant admits part of the plaintiff's claim, as in such circumstances such admission is only subject to the counterclaim which might turn out to be larger in amount (*Court* v. *Sheen* (*supra*)). Order 14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the court, or to make him liable in such a case to be put on terms of paying into court as a condition of leave to defend (*Jacobs* v. *Booth's Distillery Co.*, 85 L.T. 262, H.L.). Where there is clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to the trouble and expense of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should not be for leave to defend but should be for judgment for the plaintiff on the claim with a stay of execution until the trial of the counterclaim (*Sheppards & Co.* v. *Wilkinson & Jarvis* (1889) 6 T.L.R. 13 C.A.)."

In *Lee Guat Eng* v. *Seet Tiam Hock*,[2] Pawan Ahmad J., held that where there was a plausible counterclaim upon the hearing of an Order 14 application, even if judgment was given for the plaintiff on his claim, there should be stay of execution pending the trial of the counterclaim. In his judgment at page 179, the learned Judge said:

"Now, coming to the question of stay of execution, I think it will be necessary for me to quote a passage from the *Annual Practice* 1957 page 194 under the heading of 'Counter-claim.'

'...Where the defendant has clearly no defence to the plaintiff's claim but sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order on the plaintiff's application under O. 14 should not be for leave to defend but should be for judgment for plaintiff on the claim with a stay of execution till the trial of the counterclaim, or pending further order...'

In view of the above passage, I do not think it is necessary for me to go into other authorities cited by counsel. It is sufficient to say that where there is a counterclaim, upon the hearing of an Order 14 application, even if judgment is given for the plaintiff on his claim, there should be stay of execution pending the trial of the counterclaim or pending further order."

Mr. Kumar submitted that in the present case the counterclaim was not *bona fide* nor was it plausible.

The question for the Court to consider in the present case is whether there was a *bona fide* and plausible counterclaim? In its statement of defence, the defendant averred that at the trial of the suit the defendant would adduce evidence of the fact that the plaintiff, in breach of its contractual obligations cancelled the advertisement, which was for the benefit of the defendant, without the defendant's consent. As a result, the defendant suffered loss of sales and accruable profits. The loss incurred was expected to exceed the plaintiff's claim. In its counterclaim, the defendant averred that it was entitled to damages in the sum of $250,000.00, which exceeded the plaintiff's claim. Mr. Kumar submitted that the counterclaim did not contain particulars. Mr. Sivaloganathan, counsel for the defendant replied that the plaintiff could always ask for better and further particulars. He added that at the time the defence and counterclaim was filed the defendant did not have the proper account yet as accounting took sometime. This was a case of a running account of advertising. He further added that the counterclaim was connected with the subject matter of the claim. I find that the defendant's counterclaim was not made in bad faith.

With regard to the question of plausible counterclaim, it is necessary to ascertain what constitutes a plausible counterclaim? In the *Societe's* case, Abdoolcader J. stated the proposition that if "the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order...should be for judgment for the plaintiff on the claim with a stay of execution until the trial of

the counterclaim." The learned Judge based this proposition on the decision of the Court of Appeal in England in *Sheppards & Co.* v. *Wilkinson & Jarvis.*[3] In that case, the Master of the Rolls said:

"There might be either a defence to the Claim which was plausible, or there might be a counterclaim pure and simple. To shut out such a counterclaim if there was any substance in it would be an autocratic and violent use of Order XIV. The Court has no power to try such a counterclaim on such an application, but if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded."

Lindley L.J. in the same case said, "The counterclaim was by no means frivolous, and the defendants ought not to be shut out from trying it." It is clear that when considering whether the defendant had pleaded a plausible counterclaim the test is whether or not it is reasonably possible for the defendant to succeed if the counterclaim is brought to trial. Secondly, whether the counterclaim is frivolous or not. In my judgment, the defendant has set out a plausible counterclaim in that it is reasonably possible for it to succeed at the trial. Furthermore, the counterclaim is not frivolous.

Mr. Kumar contended that the defendant had failed to establish that it had a plausible counterclaim because the defendant had not filed an affidavit to explain how it had a plausible counterclaim. From the record, I find that the defendant had entered appearance on July 12, 1984. The defence and counterclaim was filed on July 18, 1984. I do not think it is mandatory for the defendant to file any affidavit since the defence and counterclaim had already been filed.

For the reasons stated above, I confirm the order I made in Chambers on November 11, 1984 *i.e.* the plaintiff's appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Siva, Thurai, Mariany & Co.*

BHAGWAN SINGH & CO. SDN. BHD. v. HOCK HIN BROS. SDN. BHD.

[O.C.J. (Edgar Joseph Jr. J.) June 13, 1986]

[Penang – Originating Motion No. 27 of 1985]

Land Law – Caveat – Application to remove – Priority of equities – National Land Code, 1965, s. 327(1).

Land Law – Easement – Priority of equities – National Land Code, 1965, s. 327(1).

On July 30, 1945, one T.V. Templeton, since deceased, sold a plot of land comprised in lot 64(1A) (now known as Lot 52) M.K. 17, Batu Ferringhi, Penang, to the respondent company, retaining other land adjoining it, being lot 64(1) (now known as lot 39). At the time of the said sale and purchase it was orally agreed between the parties that the purchaser and its successors in title would have a right of way with or without vehicles to pass over the then existing road on lot 39 ("the servient land").

Similarly also on July 30, 1945 the deceased Templeton sold another adjoining plot of land being lot no. 64(13) M.K. 17, Batu Ferringhi (now known as lot 51) to one Choong Eng Hye, a Director of the respondent company. Again as in the case of the sale to the respondent company there was an identical oral agreement whereby the purchaser Choong and his successors-in-title would have a right of way as aforesaid.

Then on July 12, 1971, the Trustees of the Will Trusts of Templeton, deceased, ("the Trustees"), sold five neighbouring plots of land in M.K. 17, Batu Ferringhi, including the servient land to one Low Yow Chuan, the Managing Director of Low Yat Holdings Sdn. Bhd. pursuant to an agreement of sale and purchase dated July 12, 1971. The effect of clause II of this agreement of sale and purchase was that the five plots of land were sold subject to a right of way over the existing road on the servient land thus giving adjoining landowners access from their land to the public highway known as Batu Ferringhi road. By a transfer dated September 29, 1971 the said Low Yow Chuan conveyed the five plots of land to Low Yat Holdings Sdn. Bhd. as his nominee. Ten years later by a letter dated January 7, 1982 the Trustees assigned to the respondent company the benefits of clause II aforesaid, which the latter duly accepted.

By an agreement dated July 30, 1980, Low Yat Holdings agreed to sell and the applicant company agreed to purchase, plot T/20 (now lot 545 – "the applicant company's plot"), comprised in the servient land, with a house to be erected thereon at a price of $275,000.00 and $3,564.00 for additional work. The applicant company had paid a substantial part of the purchase price but was unable to obtain a registrable transfer because of the existence of a private caveat imposed by the respondent company as recently as May 31, 1983 against that part of the servient land to protect its claim to a registrable easement. The applicant company therefore applied under section 327(1) of the National Land Code, 1965 for the removal of the caveat.

The sole question for the determination of the court was the question of the priority of equities.